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SUPREME COURT, U.S.

No. 08-133

IN THE
Supreme Court of the United States

THE CADLE COMPANY,

Petitioner,

v.

JOSEPH and JOYCE FRIEDHEIM,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

ROSEMARY J. ZYNE
5430 L. B. J. Freeway
Suite 1200
Dallas, Texas 75240
(214) 739-9119
(214) 739-2332 (Facsimile)

Attorney for Respondents

217750

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether the Fifth Circuit actually decided an important question of federal law when it *per curiam* affirmed without opinion the lower courts' decision which was decided on alternative grounds, and then determined that its affirmance not be published and be of no precedential value?

2. Whether this Court should grant review when the *Questions Presented* to this Court by Petitioner were never argued in the trial court and where Petitioner admitted in the trial court to a different burden of proof than argued to this Court?

3. Whether, if the Fifth Circuit did decide an important federal question, Petitioner has presented compelling reasons to grant the petition where even if this Court decided in favor of Petitioner, the ultimate outcome of the case would be the same and Petitioner would still lose?

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INTRODUCTION

Petitioner has presented no compelling reasons for its Petition for a Writ of *Certiorari* to be granted ("Petition"). *See* Sup. Ct. R. 10. Specifically, Petitioner (1) fails to demonstrate that the Fifth Circuit Court of Appeals decided an important question of federal law, (2) fails to demonstrate that Petitioner did not waive its arguments now presented to this Court when it failed to make those arguments in the trial court and where it actually admitted to a different burden of proof in the trial court, and (3) fails to demonstrate that even if Petitioner succeeded before this Court that the ultimate outcome of the case would be any different.

Therefore, the Petition should be denied.

Pursuant to 11 U.S.C. § 541(b), when an individual files for bankruptcy protection, all of his real and personal property becomes property of the bankruptcy estate, except for certain property excepted under §§ 541(b) and c(2). Bankruptcy Code § 522(b) states that notwithstanding § 541 discussed above, an individual debtor may exempt from property of the estate the property listed in either § 522(b)(1); i.e., specific property itemized in § 522(d)—commonly referred to as "the federal exemptions"; or, in the alternative, under § 522(b)(2); i.e., any property that is exempt under federal law other than § 522(d) or state or local law of the place where the debtor is domiciled—commonly referred to as "the state exemptions".

Pursuant to Bankruptcy Rule 4003(a), the Debtor must list the property claimed as exempt on his schedule of assets. Pursuant to Bankruptcy Rule 4003(b), a creditor may file objections to the list of property claimed as exempt. Pursuant to Bankruptcy Rule 4003(c), in *any* hearing under Bankruptcy Rule 4003, the objecting party has the burden of proof that the exemptions are not properly claimed and the Bankruptcy Court shall hear the objection upon notice.

In quoting Bankruptcy Rule 4003(c) in its *Questions Presented* to this Court, Petitioner omits the crucial clause of the Rule—that the objecting party has the burden of proof ***in any hearing on objection to exemptions***. It is clear from this clause that **all** objections to exemptions, whether claimed pursuant to Bankruptcy Code § 522(b)(1); i.e., "the federal exemptions"; or whether claimed pursuant to Bankruptcy Code § 522(b)(2); i.e., "the state exemptions"; shall be heard by the Bankruptcy Court and that the objecting party has the burden of proof. Accordingly, Petitioner's *Questions Presented* are inaccurate and misleading when Petitioner omits this clause and states that "Bankruptcy Rule 4003(c) does not define the applicable burden of proof; does not state whether such burden is applicable when debtor elects the state exemptions; and does not address the effect when a debtor claims the state exemptions and the burden of proof under state law differs from that prescribed under Bankruptcy Rule 4003(c)." Petition at i. Under the plain meaning of Bankruptcy Rule 4003(c), the burden of proof is on the objecting party "in any hearing" whether the state or federal exemptions are claimed under Bankruptcy Code § 522(b).

Petitioner also fails to point out in its *Questions Presented* that Petitioner admitted in the Bankruptcy Court that Bankruptcy Rule 4003(c) applied to the case at hand and that Petitioner at all times carried the burden of persuasion under Bankruptcy Rule 4003(c) to prove that the exemptions were improperly claimed. Petitioner never argued in the Bankruptcy Court that Bankruptcy Rule 4003(c) did not apply when the state exemptions are claimed under the Bankruptcy Code. Petitioner simply asked the Bankruptcy Court to use its "leeway" to assign the burden of production to the Respondents and the burden of persuasion to Petitioner (which it admitted the objecting party at all times carried). Petitioner never argued to the Bankruptcy Court that a state court burden of proof should apply. Therefore, Petitioner waived these arguments.

Petitioner also fails to point out in its *Questions Presented* that not only did the Bankruptcy Court rule that Petitioner had the burden of proof under Bankruptcy Rule 4003(c) and that it failed to meet its burden, but that the Court ruled in the alternative that even if the Respondents had the burden of proof, that they met their burden by a preponderance of credible and persuasive evidence. Accordingly, no matter what and to whom the burden of proof was assigned, the result would be the same – the Respondents would prevail. The District Court affirmed the Bankruptcy Court's decision. The District Court ruled that not only was the Bankruptcy Court correct in assigning the burden of proof to Petitioner, but that its ruling in the alternative was analytically proper and that whether the burden was on the debtor or the creditor, the Bankruptcy Court found that more than 50 percent of the evidence weighed in favor of the Respondents.

Petitioner also fails to point out in its *Questions Presented* that the Fifth Circuit Court of Appeals *per curiam* affirmed the above decisions without opinion and specifically determined that its decision should not be published and that it had no precedential value. This could hardly be interpreted as the Fifth Circuit's deciding an important issue of federal law and, therefore, Petitioner has not presented any compelling reason why this Court should grant its petition.

In addition, Petitioner's first issue presented (which burden of proof applies when state law and bankruptcy law burdens of proof differ) makes it appear that there is a different burden of proof under state law and under Bankruptcy Rule 4003(c). As is discussed in detail in the brief herein, there is no material difference between the Bankruptcy Rule 4003(c) burden of proof and the Texas Property Code § 42.0021 retirement exemption burden of proof, and, therefore, there is no compelling reason for the Court to grant the petition. Under both longstanding bankruptcy and Texas law, the debtor must only show that the property claimed as exempt under Texas Property Code § 42.0021 is "of a type" described in that section. Once the debtor has met that minimal burden, the objecting party must prove that the exemption is not properly claimed. *Lozano v. Lozano*, supra; *In re Cole*, 205 B.R. 382 (Bankr. E.D. Tex. 1997), and *In re Harrington*, 306 B.R. 172, 181 (Bankr E.D. Tex. 2003), *In re Lester*, 141 B.R. 157, 162 (S.D. Ohio 1991). Since there is no material difference in the burdens of proof, there is no compelling reason for the Court to grant the Petition since the ultimate outcome

of the case would be the same and Petitioner would still lose.[1]

Also, even if the burden of proofs were different under state and bankruptcy laws, the ultimate outcome of the case would still be the same because the Bankruptcy Court ruled in the alternative that even if the Respondents had the burden of proof, they met it by a preponderance of the evidence. (Pet. App. 14a-15a).

Finally, Petitioner's second issue presented [whether a burden-shifting requirement should be read into Bankruptcy Rule 4003(c)] is also not a compelling reason for the Court to grant the Petition since longstanding bankruptcy law makes clear that the debtor has only a minimal burden of showing that the asset claimed as exempt is of a type for which the exemption is applicable and that it is the objecting party's burden to prove that the property does not qualify as exempt.

Accordingly, Petitioner has not presented any compelling reasons for this Court to grant the writ and the Petition should be denied.

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1. Petitioner misstates in its *Questions Presented* that the Debtor is uniquely in possession of evidence to support the exemption. Petitioner points to nothing to support this statement. Generally, the majority of the evidence presented by Debtors to support their position that their IRAs are exempt under the Internal Revenue Code are documents from the companies that manage the IRAs and from the IRS; and thus not "uniquely in possession of the Debtors".

STATEMENT OF THE CASE

Respondents/Debtors, Joseph Friedheim and Joyce Friedheim, ("Debtors/Friedheims") ages 76 and 70 respectively, filed for Chapter 7 bankruptcy protection in May, 2005. Pursuant to Bankruptcy Rule 4003(a), the Friedheims listed in their bankruptcy schedules certain items of property which they claimed as exempt from the bankruptcy estate, including all of their household goods and furnishings, a New York Life Insurance Company annuity, and four Individual Retirement Accounts (IRAs)—two Fidelity Investment Roth IRAs, a Fidelity Investment Simple IRA, and a T. Rowe Price IRA which was a rollover from Joyce Friedheim's 401k with her former employer.

Without requesting any documents or other information from the Friedheims regarding the validity of these exemptions, Petitioner, The Cadle Company ("Cadle") summarily filed objections to almost every item of personal property claimed as exempt by the Friedheims. Only after these objections were filed did Cadle conduct any discovery and begin requesting documents from the Friedheims in an attempt to support its objections—even though under Bankruptcy Rule 2004, creditors can conduct a pre-objection examination of the debtors to determine if an objection is warranted. The Friedheims produced volumes of documents in response to these requests. Upon demand by the Friedheims, after over a year of legal wrangling, Cadle ultimately withdrew its objections to all of the Friedheims' household goods and furnishings and the Friedheims decades-old annuity. However, Cadle refused to withdraw its objections to the IRAs, stating only that

the documents produced by the Friedheims do not definitively show that the IRAs are qualified under the Internal Revenue Code of 1986. ("IRC").

At the evidentiary hearing on the objections, Cadle admitted that it, as the objecting party, had at all times the burden of persuasion pursuant to Bankruptcy Rule 4003(c), but asked the Bankruptcy Court to use its "leeway" to assign the burden of production to the Friedheims. The Bankruptcy Court ruled that Cadle had the burden of proof pursuant to Bankruptcy Rule 4003(c).

At the hearing, Cadle was unable to put forth any evidence that the IRAs were not qualified under the IRC and put on no expert witness to support its claim that the IRAs were not IRC qualified.

The Friedheims, on the other hand, identified each of their IRAs from the volumes of documents they produced, and showed that the documents qualified under the Internal Revenue Code of 1986. This was further supported by the testimony of their expert witness.

Based on the total lack of evidence to support Cadle's objection that the IRAs were not qualified under the IRC, the Bankruptcy Court ruled that Cadle did not meet its burden of proof by a preponderance of the evidence and overruled Cadle's objection to exemptions. The Court further found that even if the Friedheims had the burden of proof, that they had met their burden by a preponderance of the evidence that the exemptions should be allowed.

On appeal, the District Court correctly applied the plain meaning of Fed. R. Bankr. P. 4003(c) and the Texas common law in affirming the Bankruptcy Court's decision that Cadle had the burden of proof by a preponderance of the evidence that the IRAs do not qualify under the IRC and that it failed to meet that burden.

The District Court noted that based on both federal and state law, once the Debtors make their minimal showing that the IRAs are an interest of a type exempt under Texas Property Code § 42.0021, the burden is on the objecting party, pursuant to Fed. R. Bankr. P. 4003(c) and Texas Property Code § 42.0021, to demonstrate that the IRAs are not exempt. The District Court recognized that Texas courts have not articulated the "applicable standard of proof which must be met by the objecting party," that is, "whether the burden is satisfied by a preponderance of the evidence or some more stringent standard." The Court, however, observed that Cadle did not offer a standard that must be met in order to consider the objecting party's showing to be sufficient rebuttal evidence. The Court also pointed out that Cadle failed to direct the Court to any testimony, documents, or other evidence in the record showing that it met its burden that the IRAs did not qualify under the Internal Revenue Code. Cadle did not ask the Court to make an *Erie* guess as to what the Texas courts would do or to certify the question to the Texas Supreme Court. And the District Court did not need to do so because it was clear from the plain meaning of § 42.0021 and Texas common law that once the Friedheims made a showing that the asset was of the type exempt under the statute, Cadle had the burden of proving that the asset was not qualified under the IRC.

The District Court also found that the Bankruptcy Court's alternative holding was proper, i.e., whether the burden was on the debtor or the creditor, the Bankruptcy Court found that more than 50 percent of the evidence weighed in favor of the debtors.

In a *per curiam* ruling, the Fifth Circuit affirmed without opinion. The Circuit Court determined that its ruling should not be published and that it is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. Accordingly, there was no decision by the Fifth Circuit on an important question of federal law as alleged by Petitioner.

REASONS FOR DENYING THE PETITION

1. Summary of Argument

A. The Fifth Circuit did not decide an important question of federal law

This Court should not grant review when the Fifth Circuit did not decide an important question of federal law that has not been, but should be, settled by this Court.

Cadle asserts as its only reason why this Court should issue a Writ of *Certiorari* to review the judgment and decision of the Fifth Circuit is "because that decision decided an important question of federal law that has not been, but should be, settled by this Court." The Fifth Circuit, however, did not decide an important question of federal law. The Bankruptcy Court entered its unpublished *Order on The Cadle Company's Objection*

to Debtors' Schedule C Exemptions, holding that pursuant to Bankruptcy Rule 4003(c), Cadle, as the objecting party on the objection to exemptions of the Friedheims' Individual Retirement Accounts (IRAs), had the burden of proving that the Friedheims' exemptions are not properly claimed and that Cadle did not meet that burden. (Pet. App. 14a). The Court alternatively held that even if the Friedheims had the burden of proof, they have met it by a preponderance of the evidence. (Pet. App. 14a).

The District Court affirmed the Bankruptcy Court's decision by applying the plain meaning of Fed. R. Bankr. P. 4003(c) and the Texas common law, both of which state that once the Debtor makes his minimal showing that the IRAs in question are an interest *of a type* exempt under Tex. Prop. Code Ann. § 42.0021, the burden is on the objecting party to demonstrate that the IRAs are not exempt. (Pet. App. 7a-8a). The District Court observed that Cadle points to no evidence in support of its contention that the IRAs in question do not qualify as exempt property under Texas law and that Cadle failed to direct the court to any testimony, documents, or other evidence in the record showing that it met its burden of proving that the IRAs do not qualify as exempt property. (Pet. App. 10a-11a). The District Court also found that the Bankruptcy Court's alternative holding was proper, i.e., whether the burden was on the debtor or the creditor, the Bankruptcy Court found that more than 50 percent of the evidence weighed in favor of the debtors. (Pet. App. 11a).

In a *per curiam* ruling, the Fifth Circuit affirmed without opinion. The Circuit Court determined that its ruling should not be published and that it is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4. (Pet. App. 1a-2a). Pursuant to 5TH CIR. R. 47.6, a judgment may be affirmed without opinion

> when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of facts that are not clearly erroneous; . . . and (5) no reversible error of law appears.

Accordingly, there was no decision by the Fifth Circuit on an important question of federal law. The Circuit Court simply affirmed the lower courts' decision that if the burden of proof were on the objecting party, Cadle did not meet its burden; or, alternatively, if the burden of proof were on the party claiming the exemption, the Friedheims met their burden. Therefore, Cadle has failed to demonstrate any compelling reason why Cadle's Petition for Writ of Certiorari should be granted. *See* Sup. Ct. R. 10.

B. Petitioner waived its arguments by its admissions in the trial court and by its failure to argue them in the trial court

This Court should not grant review when the *Questions Presented* to this Court by Petitioner were never argued in the trial court and where Petitioner admitted in the trial court to a different burden of proof than argued to this Court.

As stated above, Petitioner has failed to show that the Circuit Court decided the burden of proof issue, but even if it is determined that it did so by its silence, there is still no compelling reason to grant the petition because Petitioner waived its arguments by failing to timely raise them. In the Bankruptcy Court, the only issue presented regarding burden of proof was whether there was a shifting burden of proof under Bankruptcy Rule 4003(c) which would give the Debtor the burden of production and the objecting party the ultimate burden of persuasion. There was no issue raised in the Bankruptcy Court regarding defining the applicable burden of proof under Bankruptcy Rule 4003(c); whether the burden of proof under § 4003(c) is applicable when a debtor elects state exemptions; and the effect when the debtor claims state exemptions and the burden of proof under applicable state law differs from that prescribed under Bankruptcy Rule 4003(c). In fact, the Petitioner admitted in the Bankruptcy Court that it had the ultimate burden of persuasion under Bankruptcy Rule 4003(c). The parties proceeded in the Bankruptcy Court pursuant to Bankruptcy Rule 4003(c). Cadle waived these arguments and this Court should not grant review.

C. Granting the writ would serve no practical purpose because the ultimate result would be the same no matter what the burden of proof applied.

Petitioner has not presented compelling reasons to grant the petition since review by this Court would have no practical effect in this case because even if this Court decided in favor of Petitioner, the ultimate result in this case would be the same and Petitioner would still lose.

Even if the Bankruptcy Court applied an incorrect burden of proof, certification may be denied where resolution of the conflict would be irrelevant to the ultimate outcome of the case. Even if the Texas burden of proof propounded by Petitioner were applied instead of the Bankruptcy Rule 4003(c) burden of proof applied by the trial court, the ultimate outcome would be the same. As discussed in more detail in the argument below, under Texas Property Code § 42.0021 the debtor must only show that the asset claimed as exempt is of the type listed in the exemption statute. Once the debtor meets that minimal showing, the objecting party has the burden of proving that the IRA does not qualify under the IRC. *Lozano v. Lozano*, 975 S.W.2d 63, 67 (Tex. App-Houston [14th Dist.] 1998). In the case before the Court, once the Friedheims established that the assets claimed as exempt were of the type, i.e., IRAs, listed in the exemption statute, Cadle had to prove that they did not qualify under the IRC, which the Bankruptcy Court found Cadle failed to do. And, even if Cadle's argument is correct that the Friedheims carried the burden of proving that the exemptions were properly claimed, the Bankruptcy Court found, in the alternative, that the

evidence presented by the Friedheims was credible and persuasive and that, if the Friedheims had the burden of proof, they met their burden by a preponderance of the evidence. Accordingly, review by this Court would have no practical effect, because under all circumstances, Cadle loses.

2. Argument

Cadle starts out its *Summary of Argument* with a statement that discharge is a privilege not a right. "Discharge" has nothing to do with the issues before this Court. The issues relate to "exemptions" and who has the burden of proof on objections to claimed exemptions.

When a debtor files for bankruptcy protection, he can claim as exempt pursuant to 11 U.S.C. § 522(b)(1), property that is specified in 11 U.S.C. § 522(d) or, he can claim as exempt pursuant to 11 U.S.C. § 522(b)(2), property that is specified under other federal law or under state or local law. Pursuant to Bankruptcy Rule 4003(a), the debtor is required to list the property claimed as exempt on his schedule of assets. Pursuant to 4003(b), a creditor may file objections to the list of property claimed as exempt. Pursuant to 4003(c), in ***any*** hearing under Bankruptcy Rule 4003, the objecting party has the burden of proof that the exemptions are not properly claimed. The rule does not distinguish between the federal exemptions claimed pursuant to § 522(b)(1) and the state exemptions claimed pursuant to § 522(b)(2).

Cadle argues that the debtor is uniquely in possession of facts and other evidence to support the exemption and therefore should be assigned the initial burden of production, but points to no facts to support this contention And its argument that creditors lack the resources to obtain such documentation is equally unsound. It is the rare bankrupt debtors who have more resources than the creditors pursuing them. Congress understood that when it enacted Fed. R. Bank. P. 4003(c) requiring the objecting party to bear the burden of proving that the exemptions were not properly claimed. Otherwise, trustees and creditors such as Cadle would flood the Courts with meritless objections to exemptions and force the already insolvent debtors to spend extensive time and money defending an exemption claim which is rightfully given to them by law and which the law clearly favors. Many debtors would by default succumb to the pressures of these predatory creditors and would lose the exemptions that the legislatures explicitly wanted them to retain as "vital to their continued existence." *See Matter of Swift*, 129 F.3d 792 (5th Cir. 1997)

If Cadle here, when it believed that Bankruptcy Rule 4003(c) placed the burden of persuasion on the objecting party, filed objections to all of the Friedheims' household goods and furnishings, annuity, and IRAs without any evidence to support its objections, one can only imagine what objections it would file if this Court required a different burden of proof.

At the hearing on the Objection to Exemptions, Cadle's counsel admitted at the outset that Bankruptcy Rule 4003(c) was controlling in the case and that "[Cadle]

understand[s], in this particular instance where we're objecting to exemptions, that we have the burden of persuasion on that issue (of whether the IRAs do not qualify under the IRC)" and that the burden of persuasion "always remains on the Objector." R. 6:883-884. It never argued at trial that a state law burden should apply or that the state law conflicted with Bankruptcy Rule 4003(c), and therefore, waived that argument. In fact, there is no evidence that the two decade-old laws conflict. Texas Property Code § 42.0021 and Bankruptcy Rule 4003(c) and the case law following them require only a minimal showing by the debtor that the asset claimed as exempt is of a type identified in the exemption statute and place the ultimate burden of persuasion on the objecting party. *Lozano v. Lozano*, supra; *In re Cole*, 205 B.R. 382 (Bankr. E.D. Tex. 1997), and *In re Harrington*, 306 B.R. 172,181 (Bankr E.D. Tex. 2003), *In re Lester*, 141 B.R. 157, 162 (S.D. Ohio 1991). Cadle repeatedly argued throughout its appeals that once an objection is filed and "persuasive" evidence is presented to rebut the presumption of validity, the burden should shift to the debtor to produce a preponderance of evidence to support allowance of the claimed exemption. What Cadle refuses to accept is that the Bankruptcy Court found that Cadle did not present persuasive evidence to rebut such a presumption, and in fact, as the District Court observed, pointed to ***no*** evidence that the IRAs did not qualify as exempt. (Pet. App. 14a). What Cadle further refuses to accept is that the Bankruptcy Court also found that even if the Friedheims had the burden of proof, they met that burden by a preponderance of the evidence. (Pet. App. 14-15a).

A. Section 42.0021

In its "Statement" to this Court, Petitioner deceptively misstates what Texas Property Code § 42.0021 provides. It does *not* provide—as Petitioner asserts—that IRAs qualify as exempt from claims of creditors "if" they qualify under the applicable provisions of the Internal Revenue Code. The Texas Property Code provides that a person's right to the assets in an IRA **are exempt** *unless* the account does not qualify under the applicable provisions of the Internal Revenue Code of 1986. This is a critical distinction which the Texas Court of Appeals made in determining burden of proof under the IRA exemption statute and which was argued extensively in both parties' briefs in the lower courts. In the 1998 Texas Appellate Court decision of *Lozano v. Lozano*, supra, the Court stated that, under the plain meaning of § 42.0021, evidence that an account is an IRA is sufficient to establish that it is exempt *unless* evidence is presented **by the objecting party** that the IRA does not qualify for such treatment under the Internal Revenue Code. The *Lozano* Court specifically overruled its prior 1991 opinion in *Rucker v. Rucker*, 810 S.W. 2d 793 (Tex. App.—Houston 14th Dist. 1994) (which Cadle discusses for two full pages in its Petition to this Court as its authority for its assertion that the debtor has the burden of proving entitlement to the exemption). The *Lozano* Court stated in a footnote that, contrary to *Rucker*, "we believe that the plain meaning of this language imposes a burden upon the debtor to show only that the plan or account is of a type listed in that section, but not to also affirmatively prove that it qualifies under the IRC." *Id.* Notably, petition for review

in the *Lozano* case was denied. *Lozano* was decided ten years ago and there has been no Texas decision to the contrary since. Accordingly, Cadle's statement, relying on the overruled case of *Rucker*, that "[u]nder Texas law, a debtor claiming an account exemption under Section 42.0021 must show that the account qualified under the IRC," is simply a knowing misstatement of current Texas law.

B. Federal Rule of Bankruptcy Procedure 4003(c)

Cadle begins its argument regarding the burden of proof under Bankruptcy Rule 4003(c) by stating that

> [e]xperience demonstrates, that, when an objection to exemption is filed, especially where the exemption is based on state law, bankruptcy courts tend to ignore the burden of proof required under state law regarding the claimed exemption focusing instead on the burden of proof expressed in Rule 4003(c) of the Federal Rules of Bankruptcy Procedure.

(Pet. at 10). Cadle, however, cites no cases and points to no facts which would support this statement.

Cadle cites the Bankruptcy Court decision of *In re Foster*, for the proposition that the debtor has the initial burden of production to establish that the referenced property qualifies for the claimed exemption before the objecting party is obligated to go forward with his proof. *In re Foster*, 360 B.R. at 213-14. *Foster* is consistent with the holding in the case before this Court. The Court in *Foster* held that Rule 4003(c) governed objections to exemptions and that the debtor had to make an initial showing that he was entitled to the exemption.

The Debtors in this case did make an initial showing that they were entitled to the exemptions. The debtors established that the assets claimed as exempt are Roth and SIMPLE IRAs which are of a type exempt under § 42.0021(a) *unless* the creditor can prove that they do not qualify under the Internal Revenue Code of 1986.[2] R. 6:897-898, R. 6:889, R. 3:307-R. 5:878.

The Bankruptcy and District Courts in the 5th Circuit are consistent in their rulings on the issue of burden of proof with regard to objections to exemptions under the Bankruptcy Code. All hold that the Debtor must sustain a minimal burden of going forward with the evidence to establish that the property qualifies for the particular exemption. *Harrington*, *supra* at 181, *Patterson*, *supra* at 240, *In re Cole*, *supra* at 384-385. Once the Debtor meets that minimal burden, "the exemptions claimed by debtors are presumed valid until proven otherwise."

The Debtors in the case at hand made their minimal showing that the IRAs are an interest of a type exempt under § 42.0021, (in fact, as Cadle agreed, this issue was not in dispute)[3] and, once they did so, the burden was on Cadle to demonstrate that the IRAs claimed as exempt by the Debtors did not qualify under applicable

2. It should be noted that *Foster* dealt with a different exemption statute—one regarding annuities—which does not state on its face, as does the IRA statute before this Court, that the property ***is exempt unless*** it does not qualify.

3. Cadle admits in its brief before the District Court that "[t]he fact that Debtors claimed the IRAs and the documents related to the IRAs was not an issue that was in particular dispute." R. USCA 5 49.

provisions of the Internal Revenue Code of 1986. There is nothing in Bankruptcy Rule 4003(c) that would remotely indicate that Congress intended to impose a shifting burden of proof. Under the plain meaning analysis mandated by this Court, pursuant to 4003(c) the objecting party has the burden of proof on objections to exemptions.

C. The Burden of Proof Under Section 42.0021 Does Not Apply

Cadle for the first time in its brief to the Fifth Circuit argued that the District Court should have conducted a legal analysis under the *Erie* doctrine to determine whether state substantive law rather than federal procedural law governed the issue of burden of proof. Cadle never asked the Bankruptcy Court or the District Court to conduct such an analysis Rather, Cadle admitted in its hearing brief to the Bankruptcy Court, in its argument before the Bankruptcy Court, and in its brief to the District Court that at all times Cadle carried the ultimate burden of persuasion on the objection to exemptions. R. 6:883-884. It never asked the Court to conclude that Texas substantive law on the issue of burden of proof applied. It merely asked the Court to put the initial burden of production on the Debtors. By failing to raise this argument in the Bankruptcy Court and in the District Court, Cadle waived the argument. *See In re Hood*, 319 F.3d 755 (6th Cir. 2003).

Further, this Court stated that *in the absence of modification expressed in the Bankruptcy Code*, the burden of proof in an objection to claim in bankruptcy would remain where the substantive law puts it. *Raleigh*

v. Illinois Dept. of Revenue, 530 U.S. 15, 26 (2000). This Court makes clear that "Congress, of course, may do what it likes with entitlements in bankruptcy . . ." *Raleigh at* 21. Unlike the claims in *Raleigh* and the other cases cited by Cadle, the exemptions herein were claimed pursuant to § 522(b) of the Bankruptcy Code. Congress, in Bankruptcy Rule 4003(c), expressly modified the burden of proof in proceedings on objections to exemptions claimed under § 522 of the Bankruptcy Code to place the burden of proof squarely on the objecting party.[4]

Bankruptcy Rule 4003(a) provides that:

> **Claim of Exemption.** A debtor shall list the property claimed as exempt under § 522 of the Code on the schedule of assets required to be filed by Rule 1007. . . .

Bankruptcy Rule 4003(b) provides that:

> **Objections to Claim of Exemptions.** The trustee or any creditor may file objections to the list of property claimed as exempt within 30 days after the conclusion the meeting of creditors held pursuant to Rule 2003(a). . . .

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4. *See also Grogan v. Garner*, 498 U.S. 279 (1991) where clearly the state law burden of proof did not apply in the bankruptcy case when Congress delineated its own burden of proof in the Bankruptcy Rules.

Bankruptcy Rule 4003(c) provides that:

> **Burden of Proof.** In ***any*** hearing under this rule, the objecting party has the burden of proving that the exemptions are not properly claimed. *Emphasis added.*

Accordingly, state law does not apply to the burden of proof on objections to exemptions claimed pursuant to § 522 of the Bankruptcy Code, and the Bankruptcy Court and District Court correctly applied the plain meaning of Rule 4003(c) in holding that Cadle, the objecting party, had the burden of proof.[5]

D. Even if the Burden of Proof Under Texas Property Code Section 42.0021 Applied, the Friedheims still Prevail

Cadle in this case makes much ado about nothing because, as discussed previously, even if the state law burden of proof propounded by Cadle applies, the Friedheims still win. Section 42.0021(a) of the Texas Property Code provides that a person's right to the assets in an IRA **are exempt** *unless* the account does not qualify under the applicable provisions of the Internal Revenue Code of 1986.

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5. Cadle claims in a footnote that the Fifth Circuit has adopted the *Erie* decision and other decisions of this Court regarding burdens of proof, but because in the case at hand the Fifth Circuit simply affirmed the decisions of the courts below, *per curiam*, it appears that the Court chose not to follow them in the instant case. Cadle, of course, has no support for such an allegation. For the reasons stated in the brief herein, the Circuit Court found no reversible error in the decisions below and affirmed without opinion.

The Order on Motion to Dismiss Objection to Schedule C Exemptions, which was Approved as to Form by Cadle and is now a final order, clearly states that the only remaining objection to exemptions is that the above-described IRAs ***"do not qualify under the applicable provisions of the Internal Revenue Code of 1986."***—the exact language extracted from subsection (a) of § 42.0021. The IRAs are described in the Order as: Fidelity Roth IRA in the scheduled amount of $67,664; Fidelity Roth IRA in the scheduled amount of $230,065; T. Rowe Price Roth IRA in the scheduled amount of $63,063; and SIMPLE IRA in the scheduled amount of $63,083. R. 2:160-162, R. 7:1069-1070, R. 1:24-25.

Courts are in agreement that in determining the validity of an exemption claim under state law, courts should apply the plain wording of the statute. *See In re Orso*, 283 F.3d 686, 693 (5th Cir. 2002). As the *Lozano* Court stated, under the plain meaning of § 42.0021, evidence that an account is an IRA is sufficient to establish that it **is exempt *unless*** evidence is presented by the **objecting party** that the IRA does not qualify for such treatment under the Internal Revenue Code. *Lozano v. Lozano*, supra at 63, 67. Here, the individual retirement accounts are presumed exempt unless the Objecting Party – who also carries the burden of proof on the objection to exemptions –can show that the IRAs do not qualify under the applicable provisions of the Internal Revenue Code. Id. The Bankruptcy Court's order on the Motion to Dismiss Objection to Exemptions, which Cadle signed off on, describing the four accounts as IRAs and holding that the only remaining objection tracked the ***"unless the plan, contract, or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986"*** part of the exemption; along with the volumes of

documents admitted into evidence by the Debtors to support their IRA claims[6]; the Debtors' and their expert witness's testimony establishing that the four accounts are IRAs, the forms of which were approved by the IRS; show that the accounts are of a type (Individual Retirement Accounts) listed in 42.0021(a) and therefore the accounts are presumed exempt unless Cadle could prove that they do not qualify under the IRC. Whether the accounts claimed as exempt were IRAs was never in issue.[7] The only remaining objection tracked the "***unless the plan, contract, or account does not qualify under the***

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6. Cadle cites *In Re Barnes*, 275 B.R. 889 (Bankr. E.D. Cal. 2002) for the first time before this Court for the proposition that if the state exemption law places the burden of proof on the debtor, the debtor must produce the actual documents which provide the basis for the account claimed to be exempt in order to retain the exemption. First, this is a California Bankruptcy Court decision dealing with California exemption laws. Under Texas Property Code 42.0021 only requires the debtor to show that the asset is of the type listed in the statute and that the objecting party has the burden to prove the asset does not qualify under the IRC. *Lozano v. Lozano, supra.* Further, Cadle has cited no cases supporting the position that under Texas law, the debtor must produce the actual documents which provide the basis for the account claimed as exempt, nor did Cadle raise this issue in the Bankruptcy Court, the District Court, or the Court of Appeals. Second, the Bankruptcy Court in the case at hand found that if the Friedheims had the burden of proof, the evidence presented by the Friedheims met the burden of proof by a preponderance of the evidence. The decision was affirmed by both the District Court and the Circuit Court.

7. Cadle even admits in its brief before the District Court that "[t]he fact that Debtors claimed the IRAs and the documents related to the IRAs was not an issue that was in particular dispute." R. USCA5 49.

applicable provisions of the Internal Revenue Code of 1986" part of the exemption, and it is clear from the Texas Appellate Court decision in *Lozano* that Cadle had the burden on that issue under Texas law.

It is also clear that the Bankruptcy Court ruled in the alternative, that even if the Friedheims had the burden of proof, they have met it by a preponderance of the evidence based on the record made at the hearing. The Court found that the testimony of the Friedheims tied the documents to the IRAs at issue to the Court's satisfaction; that all four IRAs are sold by reputable national firms; that the testimony of Friedheims' expert was persuasive; and that the testimony of the Friedheims and their two witnesses was credible and persuasive and that the Court was convinced by a preponderance of the evidence that all four IRAs claimed by the Debtors as exempt are exempt. Thus, no what burden of proof is assigned or to whom it is assigned, Cadle still loses.

The District Court and the Fifth Circuit affirmed because they found no reversible error. Accordingly, the ultimate outcome of this case would be the same no matter what the burden—Respondents would prevail.

E. The Court Should Not Adopt a Burden Shifting Standard Applicable to Bankruptcy Rule 4003(c)

Cadle again fails to demonstrate any compelling reason why this Court should even consider whether to adopt a burden shifting standard pursuant to Bankruptcy Rule 4003(c). Cadle questions what type of burden Bankruptcy Rule 4003(c) requires if Bankruptcy Rule 4003(c) controls and Cadle has the burden of proof. Cadle argues that the Court should adopt a shift in burden standard. Cadle cites *In re Cole, supra*, for its assertion that a claimed exemption is prima facie valid until the presumption is rebutted; that to rebut the presumption, the objecting party must present persuasive evidence to support the contention that the presumption of validity must be rebutted; and that then the debtor must come forward with unequivocal evidence that the exemption is proper. But what *Cole* actually says is that the party contesting the exemption has the burden to show it was improperly claimed and *only when that burden is satisfied* must the debtor come forward with evidence that the exemption is proper. Cadle not only did not present persuasive evidence that the presumption should be rebutted, but in fact presented absolutely *no evidence* that the presumption should be rebutted. Cadle failed to meet its burden and, therefore, it loses.

Curiously, Cadle asserts, without citation to any case, that

> the imposition of a direct and all encompassing burden on the objecting creditor – often

> without access to the same information available to debtors or the resources to fully litigate an objection to exemption – *inappropriately* shifts the focus of bankruptcy from generally including all property as part of a bankruptcy estate . . . to favoring and protecting certain property claimed by debtors as exempt from the reach of creditors.

This argument clearly overlooks the general rule restated in *In re Cole*, *supra*, that the exemption statute favors the debtor and is to be liberally construed; that when an issue is in doubt because of the proof provided and the Court would be required to speculate, the party upon whom the burden of proof ultimately rests must lose. Thus, the exemptions claimed by debtors are presumed valid until proven otherwise. *In Re Cole*, *supra* at 384-385. *See also Matter of Swift*, *supra* at 801.

Further, as stated previously in this brief, the purported lack of access to information and the lack of resources to pursue objections is not substantiated by the record. Cadle points to no evidence that it lacked access to information and lacked resources. Cadle readily admits that it made no effort to obtain any documents from Fidelity Investments, T. Rowe Price, or the IRS. R. 6:901. And based on the volumes of pleadings filed in this case and the appeals taken, Cadle clearly does not lack resources.

Cadle cites *In re Carter*, 182 F.3d 1027, 1029-30 (9th Cir. 1999) for its proposition that it is "simply not enough for the debtor to state a claim of exemption and then sit back and tell the creditor 'prove me wrong." But, as seems to be a pattern in Cadle's brief, the case does not say that. Instead, *Carter* says that once an exemption is claimed, it is the *objecting party's* burden to prove that the exemption is not proper and that this means that initially, the *objecting party* has the burden of *production* **and** *persuasion* and must produce evidence to rebut the presumptively valid exemption. *Id.*

Cadle also cites *In re Mauer*, 268 B.R. 335 (Bankr. W.D.N.Y. 2001) for the same proposition. But *Mauer* differs from the case before this Court. First, *Mauer* deals with the exemptibility of IRAs pursuant to a New York State exemption statute, which, unlike the Texas statute, does not provide that the IRAs are *exempt unless* they do not qualify under the IRC. Id. Second, unlike the case before this Court, it does not appear that the debtor in *Mauer* produced any documents regarding his claimed exemption. *Id.* at 336; 338.

In the case at hand, the Debtors have provided Cadle with volumes of documents which support their claims of exemption, including initial applications for each IRA which indicate approval by the financial institutions; initial and subsequent IRA custodial agreements and disclosure statements the forms of which were pre-approved by the IRS; IRS determination letters, where the forms were not pre-approved; IRA contribution records; Debtors' payroll records; and Debtors' bank statements. Cadle's counsel confirmed this by stating at the hearing that the debtors had provided Cadle with documents sufficient to support, to Cadle's satisfaction, that the IRAs were properly funded,

and Cadle admitted in its brief that the issue of whether the IRAs were established is not in particular dispute. R. USCA 5 49. The debtors and their witnesses' testimony further evidenced the claimed exemptions. Cadle failed to provide any evidence that the IRAs were not exempt and therefore it must lose.

Cadle then cites the Bankruptcy Court decision of *In re Foster*, for the proposition that the debtor has the initial burden of production to establish that the referenced property qualifies for the claimed exemption before the objecting party is obligated to go forward with his proof. *In re Foster*, 360 B.R. at 213-14. As discussed previously, *Foster* is consistent with the holding in the case before this Court. The Court in *Foster* held that Rule 4003(c) governed objections to exemptions and that the debtor had to make an initial showing that he was entitled to the exemption.

The debtors made the initial showing that the assets claimed as exempt are IRAs and then it was up to Cadle to prove that they do not qualify under the IRC and therefore must lose.

The Petitioner has failed to demonstrate any compelling reason why this Court should grant the Petition. Because the facts of this case are so one-sided that the case would be decided in favor of Respondents no matter how the burden of proof issue was resolved, even if there were an important federal question decided by the Fifth Circuit, this case presents a poor vehicle for resolving it. Further *certiorari* may be denied where resolution would be irrelevant to the ultimate outcome of the case. *See Sommerville v. United States*, 376 U.S. 909 (1964) (*cert. denied*).

CONCLUSION

Petitioner has not established any compelling reason for this Court to grant the Petition.

(1) Petitioner has not demonstrated why this Court should grant the Petition when the Fifth Circuit did not decide an important issue of federal law by *per curiam* affirming without opinion and determining that the decision should not be published and had no precedential value;

(2) Petitioner has not demonstrated why this Court should grant the Petition when Petitioner waived its arguments presented before this Court by admitting to a different burden of proof in the trial court and by failing to present these arguments in the trial court;

(3) Petitioner has not demonstrated why this Court should grant the Petition when the ultimate outcome would not be any different because no matter what burden of proof is applied, Petitioner would still lose.

For the foregoing reasons, Respondents respectfully request that the Petition be denied.

Respectfully submitted,

ROSEMARY J. ZYNE
5430 L. B. J. Freeway
Suite 1200
Dallas, Texas 75240
(214) 739-9119
(214) 739-2332 (Facsimile)

Attorney for Respondents